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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

11 NATIONWIDE MUTUAL INSURANCE
12 COMPANY,
13 Plaintiff,
14 v.
15 ALEXANDER HOLTON, et al.,
Defendants

No. C-04-4933 MMC

**ORDER GRANTING NATIONWIDE'S
MOTION FOR SUMMARY JUDGMENT;
DENYING RAPHAELS' MOTION FOR
SUMMARY JUDGMENT; VACATING
HEARING**

(Docket Nos. 47, 53)

Before the Court are two motions for summary judgment: (1) the motion filed December 14, 2005 by plaintiff Nationwide Mutual Insurance Company (“Nationwide”); and (2) the motion filed December 15, 2005 by defendants Marie Raphael and Ray Raphael (jointly, “the Raphaels”). With respect to Nationwide’s motion, defendants John Westoby and Lynn Westoby (jointly, “the Westobys”) have filed an opposition, in which the Raphaels, and defendant Alexander Holton (“Holton”), respectively, have joined;¹ Nationwide has filed a reply. With respect to the Raphaels’ motion, the Westobys and Holton separately have filed joinders to the motion; Nationwide has filed an opposition; and the Westobys have filed a reply, which the Raphaels and Holton have joined. Having reviewed the papers filed

²⁸ ¹ Counterclaimants State Farm Mutual Automobile Insurance Company and State Farm General Insurance Company (jointly, "State Farm") initially filed a joinder in the Westobys' opposition and thereafter, on January 25, 2006, filed a notice of withdrawal of joinder.

1 in support of and in opposition to the motions, the Court finds the motions appropriate for
 2 decision without oral argument, see Civil L.R. 7-1(b), hereby VACATES the January 27,
 3 2006 hearing, and rules as follows.

4 BACKGROUND

5 The instant action was brought by Nationwide to establish its obligations under a
 6 personal liability umbrella policy Nationwide issued to Nancy and John P. Dickmeyer
 7 ("Nationwide umbrella policy" or "the policy"), with respect to a single-car automobile
 8 accident occurring on August 29, 2003, in which Nancy Dickmeyer's son, Holton, was the
 9 driver and which resulted in the death of his two passengers, Jamie Westoby and Nicholas
 10 Raphael. The Westobys are the parents of Jamie Westoby; the Raphaels are the parents
 11 of Nicholas Raphael. The parties dispute whether Holton is an insured under the
 12 Nationwide umbrella policy, and further dispute the applicability and enforceability of an
 13 exclusion from coverage.

14 On September 9, 2004, Holton pleaded guilty to two felony counts of violating
 15 California Penal Code § 192(c)(3), vehicular manslaughter while intoxicated but without
 16 gross negligence. (See Nationwide's Request for Judicial Notice Exs. D and E.) On
 17 November 1, 2004, imposition of sentence was suspended and Holton was placed on
 18 probation for a period of sixty months. (See *id.* Ex. E.)

19 On August 1, 2005, the Westobys filed a wrongful death action against Holton in the
 20 California Superior Court for the City and County of San Francisco. (See *id.* Ex. B.) On
 21 August 8, 2005, the Raphaels likewise filed a wrongful death action against Holton in that
 22 court. (See *id.* Ex. A.) In those actions, according to Nationwide, the Westobys and the
 23 Raphaels contend that the Nationwide umbrella policy provides liability coverage for the
 24 deaths of Jamie Westoby and Nicholas Raphael. (See Compl. ¶¶ 25-26.)

25 The Nationwide umbrella policy was in effect at the time of the accident.² The

26
 27 ² Nationwide further alleges that Holton was insured under two policies issued by
 State Farm. (See Compl. ¶ 12.) State Farm has agreed to pay a total of \$1,100,000 to the
 28 Westobys, and an equal amount to the Raphaels, and has filed a counterclaim against
 Nationwide seeking equitable contribution. (See Counterclaim ¶¶ 9-14.)

1 Nationwide umbrella policy identifies John P. Dickmeyer and Nancy Dickmeyer (jointly, "the
 2 Dickmeyers") as named insureds, and further provides: "[I]nsured" means you and also . . .
 3 any member of your household." (See Borovsky Decl. Ex. C (Nationwide umbrella policy)
 4 at 10 (emphases omitted).) The policy defines "member of your household" as follows:

5 "[M]ember of your household" means any person whose principal place of
 6 residence is the same as yours and who is:

- 7 a) related to you by blood or marriage, or
- 8 b) your ward or adopted child, or
- 9 c) under the age of twenty-one and in your care.

10 (See id. at 11 (emphases omitted).)

11 The policy contains an exclusion for "bodily injury, property damage or personal
 12 injury caused by a violation of a penal law or ordinance committed by or with the knowledge
 13 or consent of an insured" (hereafter, "penal law exclusion"). (See id. at 13 (emphases
 14 omitted)).

15 Nationwide alleges that Holton is not an insured under the policy because his
 16 principal place of residence at the time of the accident was not the Dickmeyers' residence.
 17 (See Compl. ¶ 28.) Nationwide further alleges that even if Holton "did qualify as an insured
 18 under the Nationwide Umbrella Policy as written, it was never the intent of the parties to
 19 that contract to provide coverage for Alexander Holton, and it should be reformed
 20 accordingly to reflect the parties['] true intentions and agreement." (See id.) Additionally,
 21 Nationwide argues, coverage is barred by reason of the penal law exclusion. (See id.)
 22 Nationwide seeks a declaratory judgment that it has no obligation under the Nationwide
 23 umbrella policy to indemnify Holton for any damages that may be assessed against him for
 24 the deaths of Jamie Westoby and Nicholas Raphael, or to defend him against any lawsuits
 25 seeking to hold him liable for those deaths.³ Nationwide also seeks reformation of the
 26 Nationwide umbrella policy to exclude Holton from coverage, in accordance with the intent

27 ³ Additionally, Nationwide seeks a declaratory judgment as to the applicable
 28 "retained limit" of the Nationwide umbrella policy, a claim that is not at issue in the instant
 motions.

1 of the Dickmeyers and Nationwide.

2 **LEGAL STANDARD**

3 Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment as
 4 to “all or any part” of a claim “shall be rendered forthwith if the pleadings, depositions,
 5 answers to interrogatories, and admissions on file, together with the affidavits, if any, show
 6 that there is no genuine issue as to any material fact and that the moving party is entitled to
 7 judgment as a matter of law.” See Fed. R. Civ. P. 56(b), (c). Material facts are those that
 8 may affect the outcome of the case. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242,
 9 248 (1986). A dispute as to a material fact is “genuine” if there is sufficient evidence for a
 10 reasonable jury to return a verdict for the nonmoving party. See id. The Court may not
 11 weigh the evidence. See id. at 255. Rather, the nonmoving party’s evidence must be
 12 believed and “all justifiable inferences must be drawn in [the nonmovant’s] favor.” See
 13 United Steelworkers of Am. v. Phelps Dodge Corp., 865 F.2d 1539, 1542 (9th Cir. 1989)
 14 (en banc) (citing Liberty Lobby, 477 U.S. at 255).

15 The moving party bears the initial responsibility of informing the district court of the
 16 basis for its motion and identifying those portions of the pleadings, depositions,
 17 interrogatory answers, admissions and affidavits, if any, that it contends demonstrate the
 18 absence of a genuine issue of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317,
 19 323 (1986). Where the nonmoving party will bear the burden of proof at trial, the moving
 20 party’s burden is discharged when it shows the court there is an absence of evidence to
 21 support the nonmoving party’s case. See id. at 325.

22 Where the moving party “bears the burden of proof at trial, he must come forward
 23 with evidence which would entitle him to a directed verdict if the evidence went
 24 uncontested at trial.” See Houghton v. South, 965 F.2d 1532, 1536 (9th Cir. 1992)
 25 (citations omitted); see also Fontenot v. Upjohn, 780 F.2d 1190, 1194 (5th Cir. 1986)
 26 (holding when plaintiff moves for summary judgment on an issue upon which he bears the
 27 burden of proof, “he must establish beyond peradventure all of the essential elements of
 28 the claim . . . to warrant judgment in his favor.”) (emphasis in original).

1 A party opposing a properly supported motion for summary judgment “may not rest
2 upon the mere allegations or denials of [that] party’s pleading, but . . . must set forth
3 specific facts showing that there is a genuine issue for trial.” See Fed. R. Civ. P. 56(e); see
4 also Liberty Lobby, 477 U.S. at 250. The opposing party need not show the issue will be
5 resolved conclusively in its favor. See Liberty Lobby, 477 U.S. at 248-49. All that is
6 necessary is submission of sufficient evidence to create a material factual dispute, thereby
7 requiring a jury or judge to resolve the parties’ differing versions at trial. See *id.*

DISCUSSION

9 Nationwide moves for summary judgment on its complaint and on the counterclaim
10 asserted by State Farm, on the ground the penal law exclusion bars any claim under the
11 Nationwide umbrella policy. The Raphaels' motion, which, as noted, the Westobys and
12 Holton have joined, seeks summary judgment on the following issues: (1) that Holton is an
13 insured under the Nationwide umbrella policy because his principal place of residence was
14 the Dickmeyers' home; (2) the policy cannot be reformed to exclude Holton from coverage;
15 and (3) coverage is not barred by the penal law exclusion in the Nationwide umbrella
16 policy. The Court will begin its analysis with the parties' arguments with respect to the
17 penal law exclusion because if said exclusion bars coverage for the accident in question,
18 whether Holton is an insured under the policy is immaterial.

A. Penal Law Exclusion

20 As noted, the penal law exclusion bars coverage for “bodily injury, property damage
21 or personal injury caused by a violation of a penal law or ordinance committed by or with
22 the knowledge or consent of an insured.” (See Borovsky Decl. Ex. C at 4.) Defendants
23 argue that the penal law exclusion is not enforceable because it is not “conspicuous, plain
24 and clear,” as required by California Supreme Court case law.

25 || The California Supreme Court has held:

[T]o be enforceable, any provision that takes away or limits coverage reasonably expected by an insured must be conspicuous, plain and clear. Thus, any such limitation must be placed and printed so that it will attract the reader's attention. Such a provision also must be stated precisely and understandably, in words that are part of the working vocabulary of the

1 average layperson.

2 Haynes v. Farmers Ins. Exchange, 32 Cal. 4th 1198, 1204 (2004) (internal quotation and
 3 citation omitted). “[C]onspicuousness, consistently with the inherent logic of that concept,
 4 refers to how a coverage-limiting provision actually has been positioned and printed within
 5 the policy at issue.” Id. at 1209. Additionally, even where exclusionary language is
 6 conspicuously placed in the policy, “[t]he language itself must be plain and clear,” which
 7 “means more than the traditional requirement that the contract terms be unambiguous”;
 8 “[u]nderstandability is also required.” See id. at 1211 (internal quotation and citation
 9 omitted). Where “material facts are not disputed, interpretation of the policy presents solely
 10 a question of law.” See id. at 1204.

11 **1. “Conspicuous”**

12 Defendants argue that the penal law exclusion is not conspicuous because it
 13 appears “in the middle of a list of 18 exclusions, many of which are esoteric or exotic
 14 exclusions which would be unlikely to attract interest from the average insured,” “[n]othing
 15 is done to distinguish the penal exclusion or to alert the reader to the breadth of its scope,”
 16 and there is “no prefatory language alerting the reader to the penal law exclusion.” (See
 17 Raphaels’ motion at 12-13.)

18 The Nationwide umbrella policy begins with a “Definitions” section, which section is
 19 followed by a section under the bolded heading, “Coverages.” (See Borovsky Decl. Ex. C
 20 at 012.) There are three bolded subheadings within the “Coverages” section of the policy:
 21 “Personal Liability,” “Defense Coverage,” and “Exclusions.” (See id.) The “Personal
 22 Liability” section provides in its entirety: “We will pay on behalf of any insured for ultimate
 23 net loss in excess of the retained limit which the insured shall become legally obligated to
 24 pay as damages because of bodily injury, personal injury or property damage.” (See id.)
 25 On the same page, under the bolded subheading “Exclusions,” the policy sets forth sixteen
 26 circumstances under which “th[e] policy does not apply.” (See id.) The penal law exclusion
 27 is the tenth of the sixteen exclusions. (See id. at 13.)

28 It is difficult to imagine how Nationwide could have placed its exclusions more

1 prominently within the policy. The exclusions are part of the section of the policy describing
2 the coverage of the policy, in the same type and size as the rest of the text, and the specific
3 exclusions are itemized beginning on the same page as the description of coverage for
4 personal liability. The cases upon which defendants rely all involve exclusions that were
5 placed far less prominently in the policy.

6 In Haynes, for example, a limitation on liability for “permissive users” of the insured’s
7 automobile appeared in a section of the policy entitled “Other Insurance,” which was
8 amended later in the policy by an endorsement; the Court held that placing the limitation in
9 a section titled “Other Insurance” was not conspicuous because there was “nothing in the
10 heading to alert a reader that it limits permissive user coverage, nor anything in the section
11 to attract a reader’s attention to the limiting language,” and that the amendment to that
12 language, contained in an endorsement buried deep within the policy, also was not
13 conspicuous. See Haynes, 32 Cal. 4th at 1205-1211. Here, by contrast, the penal law
14 exclusion is located in the “Coverages” section of the policy, precisely where an insured
15 would expect to find any exclusions from coverage.

16 Likewise, Gray v. Zurich Ins. Co., 65 Cal. 2d 263 (1966) is distinguishable. There,
17 the California Supreme Court held that an exclusion for bodily injury caused intentionally by
18 the insured was not conspicuous because “it appear[ed] only after a long and complicated
19 page of fine print, and [was] itself in fine print.” See id. at 273. Here, by contrast, the
20 exclusions appear in the section describing the coverage of the policy and are in the same
21 type size as the other coverage provisions.

22 Finally, in Thompson v. Mercury Casualty Co., 84 Cal. App. 4th 90 (2000), the
23 California Court of Appeal held that a limitation on liability for “permissive users” of the
24 insured’s automobile was inconspicuous because it did not appear in the “Liability” section
25 of the policy, “where an average layperson would expect to find it.” See id. at 97. Here, by
26 contrast, the penal law exclusion is included in the “Coverages” section of the policy.

27 Moreover, as Nationwide points out, the California Supreme Court, when presented
28 with an exclusionary clause located and printed in a manner more closely resembling the

1 clause at issue herein, has found such exclusion to be conspicuous. In particular, in
 2 National Insurance Underwriters v. Carter, 17 Cal. 3d 380 (1976), the Supreme Court
 3 considered an argument that an exclusion in an aircraft liability insurance policy, barring
 4 coverage for operation by an unqualified pilot, was not conspicuous. See id. at 384. The
 5 Supreme Court rejected the argument because the exclusion appeared in a section titled
 6 "Exclusions" on the page immediately following the definition of the insured, and was "in
 7 printing of size and intensity identical to that of the rest of the policy save only for
 8 paragraph headings." See id.⁴ The Supreme Court held: "Although we have invalidated an
 9 exclusionary clause where it is hidden in a subsequent section of the policy bearing no
 10 clear relationship to the insuring clause, or concealed in a mass of fine print, the pilot
 11 exclusion clause in the present policy suffers from neither defect and as a matter of law is
 12 conspicuous[.]" See id.

13 Accordingly, the Court finds the penal law exclusion is conspicuous.

14 **2. "Plain and Clear"**

15 Defendants further argue that the penal law exclusion is not "plain and clear," as
 16 required by California Supreme Court case law. It is not enough that exclusionary
 17 language is placed conspicuously in the policy; "[t]he language itself must be plain and
 18 clear." See Haynes, 32 Cal. 4th at 1211 (internal quotation and citation omitted). Put
 19 another way, an exclusion "must be stated precisely and understandably, in words that are
 20 part of the working vocabulary of the average layperson." See id. at 1204. Thus, in
 21 determining whether a term is plain and clear, a court "must attempt to put itself in the
 22 position of a layperson and understand how he or she might reasonably interpret the
 23 exclusionary language." See MacKinnon v. Truck Ins. Exchange, 31 Cal. 4th 635, 649
 24 (2003).

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 26 ⁴ Although the pilot exclusion appeared in two places in the policy there at issue, the
 27 Supreme Court's decision was not dependent on the fact of repetition. Rather, the
 28 Supreme Court found each such provision "conspicuous." See id. at 385 ("The pilot
 exclusion clause . . . as a matter of law is conspicuous, both in the exclusion clause and in
 the 'Declarations.'").

1 Here, defendants first argue that the penal law exclusion is not plain and clear
 2 because the phrase “violation of a penal law” contained therein is not part of the working
 3 vocabulary of the average layperson. The Court disagrees. The average layperson
 4 reading the phrase “violation of a penal law” would interpret it to mean a criminal act or
 5 crime. A “penal institution,” for example, is commonly understood to refer to a place of
 6 incarceration for persons who have been convicted of crimes. Similarly, a dictionary in
 7 common usage defines “penal code” as “[t]he body of laws relating to crimes and offenses
 8 and the penalties for their commission.” See The American Heritage Dictionary of the
 9 English Language, 4th ed., available at <http://www.dictionary.com>.⁵ Indeed, the one
 10 reported decision to have addressed the language here at issue has found “penal law” is
 11 synonymous with ‘criminal law.’” See American Family Mutual Ins. Co. v. Hadley, 648
 12 N.W.2d 769, 781 (Neb. 2002). Moreover, as Nationwide notes, California courts routinely
 13 have found exclusions for “criminal” activity to be unambiguous and enforceable. See 20th
 14 Century Ins. Co. v. Schurtz, 92 Cal. App. 4th 1188, 1189, 1195-96 (2002) (finding exclusion
 15 for “bodily injury . . . which is a foreseeable result of [a] . . . criminal act” enforceable);
 16 Century-National Ins. Co. v. Glenn, 86 Cal. App. 4th 1392, 1397 (2001) (same); 20th
 17 Century Ins. Co. v. Stewart, 63 Cal. App. 4th at 1336 (same); see also Safeco Ins. Co. of
 18 America v. Robert S., 26 Cal. 4th 758, 763-64 (2001) (noting exclusions for “criminal acts”
 19 are common and valid).⁶ Accordingly, the Court finds the penal law exclusion
 20 unambiguously excludes coverage for criminal acts.

21 Defendants next argue that an average layperson is unlikely to understand the penal
 22 law exclusion “to exclude coverage for an accident caused by a common violation of the
 23 Vehicle Code,” citing, inter alia, such examples as making an unsafe lane change and
 24 making an illegal left turn, both of which are classified as infractions in the California
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26 ⁵ The Court recognizes that a dictionary definition does not necessarily establish the
 27 average layperson’s understanding of a term. See MacKinnon, 31 Cal. 4th at 649.

28 ⁶ In Safeco v. Robert S., the California Supreme Court found invalid an exclusion for
 “illegal acts.” See id. No such provision exists in the instant policy.

1 Vehicle Code.⁷ (See Raphaels' motion at 10, 13-14.) No such violation is at issue in the
 2 instant case, however, and none of the parties contends that coverage for common traffic
 3 infractions is excluded. Here, as noted, Holton pleaded guilty to two felonies, specifically,
 4 two counts of violating California Penal Code § 192(c)(3), vehicular manslaughter while
 5 intoxicated. (See Nationwide's Request for Judicial Notice Exs. D and E.) Both offenses
 6 clearly meet the average layperson's understanding of a crime.⁸ Consequently, given the
 7 penal law exclusion, the average layperson could not reasonably expect coverage under
 8 the Nationwide umbrella policy for injuries resulting from conduct of such nature.

9 Defendants next argue that because California law precludes primary automobile
 10 insurance policies from excluding coverage for driving under the influence, see Cal. Ins.
 11 Code § 11580.1; see also *Hertz Corp. v. Home Ins. Co.*, 14 Cal. App. 4th 1071, 1078
 12 (1993), a reasonable insured would expect that an excess or umbrella policy would provide
 13 similar coverage. The issue at hand, however, is not whether a reasonable insured would,
 14 in the abstract, expect an excess or umbrella policy to provide coverage for injuries
 15 resulting from driving under the influence, but, rather, whether a reasonable insured would
 16 understand the penal law exclusion in the instant umbrella policy to bar such coverage.⁹ As
 17 noted, even where an exclusion "takes away or limits coverage reasonably expected by an
 18 insured," such exclusion is enforceable if it is "conspicuous, plain and clear." See *Haynes*,
 19 32 Cal. 4th at 1204.

20 Lastly, defendants argue that an average layperson would understand the penal law
 21 exclusion to "exclude coverage only if an accident occurs when a vehicle is consciously
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23 ⁷ California law defines "crimes and public offenses" to include felonies,
 24 misdemeanors, and infractions. See Cal. Pen. Code § 16.

25 ⁸ In determining whether an exclusion is plain and clear, the court considers its
 26 language "in the context of the facts of the case and not in the abstract." See *20th Century*
Ins. Co. v. Stewart, 63 Cal. App. 4th at 1338; see also *MacKinnon*, 31 Cal. 4th at 653-54
 27 (interpreting exclusion to extent necessary "to resolve the present case"; noting "further
 clarification may be required" in the future).

28 ⁹ The Court further notes that the same statute by which primary policies are
 restricted expressly exempts excess policies from such restrictions. See *id.*

1 being used in connection with a criminal enterprise – such as, for example, when it is being
 2 used to smuggle drugs or used as a ‘getaway’ car.” (See Raphaels’ motion at 14.) This
 3 argument is not persuasive. Nothing in the penal law exclusion limits its coverage to
 4 crimes committed with a particular state of mind. Moreover, the language of the penal law
 5 exclusion, as noted, is synonymous with an exclusion for criminal acts, and the California
 6 Court of Appeal has held that criminal acts need not be intentional to fall within the scope of
 7 the “criminal acts” exclusion. See *20th Century Ins. Co. v. Schurtz*, 92 Cal. App. 4th at
 8 1196-97 (noting exclusion “applies regardless of intent” (emphasis in original)).

9 For the reasons set forth above, the penal law exclusion is conspicuous, plain, and
 10 clear, and is therefore enforceable. See *Haynes*, 32 Cal. 4th at 1204. Consequently, the
 11 penal law exclusion bars any claim under the Nationwide umbrella policy arising out of the
 12 events relevant to the instant action.

13 **B. Other Issues**

14 As a result of the above ruling, the Court does not reach the parties’ arguments as to
 15 the location of Holton’s primary residence, and whether the Nationwide umbrella policy
 16 should be reformed to exclude coverage for Holton.

17 **CONCLUSION**

18 For the reasons set forth above,

- 19 1. Nationwide’s motion for summary judgment is hereby GRANTED.
 20 2. The Raphaels’ motion for summary judgment is hereby DENIED.

21 The Clerk shall close the file.

22 **IT IS SO ORDERED.**

23 Dated: January 27, 2006



MAXINE M. CHESNEY
United States District Judge

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